In the

Supreme Court of The United States

OCTOBER TERM, 1962

No. 40

GILBERTVILLE TRUCKING CO., INC., THE L. NELSON & SONS TRANSPORTATION COMPANY, CHARLES G. CHILBERG, CLIFFORD J. O. NELSON, GRETA C. CARLSON, AND KENNETH A. H. NELSON,

Appellants,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR APPELLANTS

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REPLY BRIEF FOR APPELLANTS

This is a direct appeal from a final judgment of a three-judge United States District Court for the District of Massachusetts which dismissed appellants' suit to enjoin and set aside certain orders of the Interstate Commerce Commission. The challenged decision of the Commission held that appellants had violated the prohibition expressed in sections 5(4), 5(5), and 5(6) of the Interstate Commerce Act,[1] denied an application for approval pursuant to sec-

[1] Relevant parts of sections 7(c), 8(b), and 10(e) of the Administrative Procedure Act (60 Stat. 241, 242, 243; 5 U.S.C. §§1006 (c), 1007(b), 1009(e)), the National Transportation Policy (54 Stat. 899), and sections 5(2), 5(4), 5(5), 5(6), and 5(7) of the Interstate Commerce Act, as amended (54 Stat. 905, 907, 908, 63 Stat. 485; 49 U.S.C. §§5(2), 5(4), 5(5), 5(6) and 5(7)) are set forth as Appendix A to the Brief for Appellants. Those statutes are herein cited by act and section number alone.

tion 5(2) of that Act of a proposed merger of appellants Gilbertville Trucking Co., Inc. ("Gilbertville Co.") and The L. Nelson & Sons Transportation Company ("Nelson Co."), and directed divestiture of the stock of Gilbertville Co., all of which is owned by appellant Kenneth A. H. Nelson ("Kenneth").

Appellees have filed a sixty-page brief citing many cases and various other authorities, but completely ignoring the existence of the Administrative Procedure Act. And they have devoted their argument principally to an attempt to compensate for the weaknesses of the Commission's Report by trying to supply necessary theories, reasons and grounds of decision which the Commission failed to state.

ARGUMENT

I. A. Appellees' arguments are not adequate substitutes for the basic findings, reasoning and substantial evidence required to support the Commission's decision.

Appellants demonstrated in their principal Brief (pp. 13-21, 47-54) that the Commission's Report failed to satisfy minimum standards established by this Court and by the Administrative Procedure Act both (*1*) in that the Report lacked basic findings and reasoning required to support and articulate the Commission's determination that appellants were guilty of a violation of law and its apparent determination that such violation was continuing and (*2*) in that the only statements in the Report which even suggest any conduct by appellants other than obviously innocent or irrelevant conduct lack the required support by substantial evidence on the whole record.

1. Appellees have used a "shotgun" technique in trying to excuse the lack of necessary basic findings and rea-

soning in the Commission's Report. Simultaneously, they (a) ask this Court to hold that two findings which the Commission made were misstatements, (b) rely upon statements in the Examiner's Proposed Report in lieu of the findings in the Commission's Report, (c) claim that findings are unnecessary,[2] and (d) attempt to supply in their Brief one of the essential findings which the Commission's Report lacks.[3] Appellees' latter two points, having been noted in the margin, do not deserve further discussion.

a. Confronted with two findings of fact by the Commission which were favorable to appellants, appellees tell this Court that both of those findings were erroneous—and they consider one to have been a deliberate misstatement intended to be facetious or sarcastic. (Appellees' Br. pp. 7-8, nn. 6, 7) However, the findings in question were clearly correct. *First*, the Commission's express finding that the

[2] In support of the Commission's having based its decision upon "all facts of record", appellees assert (Br. p. 36) that "these facts themselves constitute the 'adequate subsidiary findings' (*Minneapolis & St. Louis Ry. Co.* v. *United States*, 361 U.S. 173, 193-194) required to support the decision. No intervening findings were appropriate or necessary." But appellees' assertion that basic findings are not necessary is not supported by the *Minneapolis* case. In that case, this Court excused the Commission from its duty to make clear basic findings of fact and statements of reasons only as to certain irrelevent contentions of an intervenor—"contentions that are so collateral or immaterial that the law did not require specific findings upon them." (361 U.S. at 193).

[3] Obviously because appellants demonstrated (Br. pp. 14-19) that the Commission's finding that Kenneth "was affiliated" with Nelson Co. was fatally unsupported because the Report contained no basic finding of the "relationship" necessary to invoke section 5(6), appellees have labeled Kenneth as an "intermediary". But the Commission made no such finding, and, even if it had, it would have been devoid of support, for there is no finding or evidence that would even suggest—much less prove—such an agency "relationship" as of the time the Commission specified—when Kenneth "purchased the stock of Gilbertville" (R. 21).

connection between Kenneth and Nelson Co. as, respectively, free lance tariff consultant and client had ended by March 1, 1953 (R. 19), which was a Sunday, impairs appellees' argument because it means that Kenneth had severed all connections with Nelson Co. before he became connected in any way with the operations of Gilbertville Co.; as appellees admit (Appellees' Br. p. 6), Kenneth had sold his stock and resigned his corporate offices in Nelson Co. on September 22, 1951; as the Commission found and the contract itself confirms (R. 667), Kenneth's contract to buy Gilbertville Co.'s stock was dated March 2, 1953; it was not until March 3, 1953 that the contract was executed (R. 670) and Kenneth deposited escrow money and took over the operation of Gilbertville Co. (R. 230);[4] and the stock of Gilbertville Co. was not actually transferred until July 24, 1953 (R. 308). Appellees' sole basis for asking this Court to overrule the Commission's finding that Kenneth's tariff consultant activities had ended by March 1, 1953 is one ambiguous guess by accountant Solomon.[5]

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[4] Although the contract provided for financial adjustment "as of" February 28, or March 1, 1953 (R. 668-69), obviously the seller would not have turned over the operations of Gilbertville Co. until after the contract was signed and the money was deposited on March 3, 1953. Moreover, when the Bureau attorney asked, "Then he [Kenneth] took the operation [of Gilbertville] over before he purchased it, is that correct?", Mr. Solomon answered, "*No.* He deposited escrow funds *at that time*, on March 3, 1953, I believe." (R. 230) (Emphasis added.)

[5] When asked whether all Kenneth's 1953 income as a tariff consultant was "received for services performed pr or to his acquisition Gilbertville", Mr. Solomon guessed "Some of that would have to be after." (R. 361) That the statement was a guess is obvious from the phraseology ("would have to be"), from Mr. Solomon's admitted lack of knowledge and confusion about the subject (R. 358-61) and from the fact that Mr. Solomon's only source of information was income tax returns (which, as the Examiner (R. 281), Mr. Solomon (R. 282) and Judge Wyzanski Stenographic Record of Hearing before Three-Judge Court [here-

Appellees emphasize that Mr. Solomon was a witness called by appellants, but that does not make him either omniscient or infallible.[6] *Second*, appellees also ask this Court to hold that the Commission did not mean the words "free lance" in the finding that Kenneth was a "'free lance' tariff consultant" (R. 19) because the Commission was quoting the same Mr. Solomon. However, the obvious reason why "free lance" appears in quotation marks is that it is a colloquial expression. Moreover, that Kenneth was an independent contractor was proved by other uncontradicted testimony by Mr. Solomon which in no way depends upon the phrase "free lance"[7] and is also implied by the term "consultant", which the Commission did not put in quotation marks.[8]

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inafter cited as "Court Hearing"], p. 34) have all noted and Commission counsel conceded in the District Court (*ibid.*), in no way indicate *when* during a year income was received).

Moreover, Mr. Solomon was apparently saying "Some of that [money] would have to be [received] after", not "Some of that [money] would have to be [received for services performed] after." Because Kenneth, like other independent professionals, received his consulting fees when he rendered statements, not when he rendered services (R. 242-43, 276-82), there is no necessary relationship between the amount of fees received in 1953 and the extent of services in that year. Inasmuch as there is no evidence or finding that Kenneth received any fees in 1951, although he was a consultant from September through December 1951, Kenneth may well have been paid for 1951 in 1952 and for much of 1952 in 1953.

[6] For example, he inadvertantly gave erroneous testimony to the effect that Howard Chilberg was a director of Nelson Co. (R. 253-54) As Mr. Solomon himself said, he had "a few hundred accounts; and, boy, this is pretty hard." (R. 286)

[7] Mr. Solomon, a public accountant (R. 184) who was an independent contractor (R. 223-24), described Kenneth as "an independent, just the same as myself" (R. 276) and specifically denied that Kenneth was an employee of Nelson Co. (R. 242).

[8] See, e.g., *State v. E. J. Doyle & Co.*, 96 Atl. 605, 610 (R. I. 1916); *Gulf & Southern Transportation Co., Inc.—Extension—Century, Florida*, 71 M.C.C. 1, 2 (1957). See also R. 104.

b. Tacitly admitting that the Commission's findings were insufficient, appellees have based their Brief on *some* findings, inferences and comments which they have carefully selected from the Examiner's Proposed Report.[9] However, appellees' reliance upon the Examiner's Proposed Report is not justified, even though (as appellees repeatedly state) appellants did not take formal exceptions to the Examiner's Proposed Report, which concluded that the investigation should be terminated and section 5(2) approval should be granted, for the Commission's Report is based upon the Commission's own findings and inferences as to what "[t]he evidence shows". (R. 19)[10] More-

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The Commission's statement that at an "office at one of Nelson's terminals . . . [Kenneth] served only Nelson" Co. is not inconsistent with Kenneth's having been a free lance consultant holding himself out to do—and even doing—tariff work for other clients elsewhere. Nor is there any evidence that Kenneth had no other clients. The only evidence is that during 1952 and 1953 Kenneth's only income as a tariff consultant was from Nelson Co. (R. 358-60); it is perfectly possible that Kenneth had other clients but (because of contingent-fee arrangements or for other reasons) he was not paid by such other clients until after 1953 or was not paid by them at all. As Commission counsel conceded, the Bureau had the burden of proving that Kenneth had no other clients, if that were so (R. 105-06), and the Bureau did not sustain that burden.

[9] Some of these selections from the Examiner's Proposed Report have been not only drastically edited, but also completely divorced from their original context. For example, the scrap of quotation in appellees' footnote 10 (Br. p. 11) was carved out of the Examiner's discussion of the contention that Nelson Co. sacrificed some of its traffic to Gilbertville Co.—a contention that the Examiner rejected. (R. 68; see R. 75-76)

[10] As Commission counsel told the District Court, the factual statements in the Commission's Report (R. 19-21) "are the findings of fact of the Commission, there is no doubt of it." (Court Hearing, p. 41) It is clear that the Commission is the primary fact-finder. See Administrative Procedure Act § 8(a); *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358, 364; 2 Davis, Administrative Law § 10.04, at 26 (1958). On appellants' petition the Commission reconsidered Division 4's

over, appellees in their Brief have distorted those findings by disregarding two essential conclusions of the Examiner which qualify and modify everything else the Examiner said: that as to whether or not appellants were guilty of a violation of law the case was on "the borderline" (R. 64) and that "there is no evidence of extensive or flagrant violations of either the act or the regulations. The violations shown . . . appear to be the result in some cases of ignorance of the requirements; and in others of a degree of carelessness and not willfulness." (R. 72).

2. Apparently trying to compensate for the lack of substantial evidence to support certain statements in the Commission's decision, appellees have (a) cited a few additional pages of testimony, (b) claimed that it is immaterial that the appellants' practices were legitimate, and (c) made more unsupported and exaggerated statements.[11]

a. Appellees (Br. p. 37 n. 27) have cited four bits of evidence not cited by the District Court (R. 119), which appellees claim support two of the nine statements which appel-

decision (R. 13); subsequently, on appellants' petition of August 17, 1959, the Commission reexamined and refused to reopen its decision (R. 27-28). Having attacked the findings of fact in the Commission's Report in their petition of August 17, 1959, in the District Court, and in their notice of appeal to and jurisdictional papers in this Court, appellants are in no way precluded from continuing that attack.

[11] Appellees' Brief (pp. 38-39) also contains citations to other cases where the Commission has found a violation of law, but the facts of those cases are strikingly different from the facts of the present case. For example, in *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113 (1962), upon which appellees rely heavily, some 98% of Coady's freight was interlined with Nigro, whereas only a very small percentage of the freight that either carries is interlined between Nelson Co. and Gilbertville Co. (see Appellants' Brief, p. 50). Also, Gilbertville Co. pays fair rental for equipment it leases (see R. 234), but equipment was leased by Nigro at a nominal rate of one dollar per year.

lants (Br. pp. 47-54) demonstrated were not supported by substantial evidence on the whole record, but two of those bits of evidence are obviously irrelevant and a third was discussed in appellants' principal Brief.[12] The fourth citation is to R. 558-60, part of investigator Shea's story about a visit to Newton, Massachusetts, where both Nelson Co. and Gilbertville Co. operate terminal facilities (R. 20). Answering a question as to what he saw and heard, Mr. Shea said only that he "saw Mr. Clifford Nelson hire a driver" (apparently Mr. Shea heard nothing) (R. 558); some time later Mr. Shea saw that driver driving a Gilbertville Co. vehicle (R. 559). Plainly that testimony is not substantial evidence of any unlawful conduct.[13]

b. Appellees say that it is futile for appellants to show, as they have shown (Appellants' Br. pp. 48-54), that the factual statements in the Report which are not obviously innocent are exaggerations without any substantial basis in the whole record, for "justifications of separate practices can [not] detract significantly from the Commission's determination that the entire picture demonstrates the ille-

[12] R. 541-43 is cited by appellees as proof that "the same driver and vehicle will perform the through movement" (R. 20), but the testimony only describes a unit leased to Gilbertville Co., with placards displayed to show the lease. The evidence at R. 514-15, which appellees cite for the same purpose, was discussed in appellants' principal Brief (pp. 49-50, 51). R. 539-40 is cited in connection with alleged "managerial direction [of each company] from officers of the other", but the cited testimony is patently irrelevant.

[13] Mr. Shea also related that after he (Shea) had complained to Clifford Nelson that there were no papers covering a Gilbertville Co. shipment, Mr. Nelson reported the problem by telephone to someone who could and did rectify the situation. (R. 559-60) Inasmuch as Mr. Shea chose to speak to Clifford Nelson about a Gilbertville Co. matter, the only thing Mr. Nelson could properly do was to relay the information, as he did. In short, all the material evidence in connection with alleged "managerial direction" is discussed in appellants' Brief (pp. 52-53).

gality" (Appellees' Br. p. 37). In other words, appellees contend that reference to enough instances of innocent conduct can justify a conclusion of illegality. Such a rule would make vagueness a virtue. But it is clear that where (as in the present case) an agency "did not rest its order on any single finding of fault standing alone but on the sum of its findings" and a reviewing court finds even a single finding "infected with error, the [agency's] . . . ultimate conclusion cannot stand and the case must go back . . . for further study." *Carey* v. *Civil Aeronautics Board*, 275 F.2d 518, 522 (1st Cir. 1960). It is for the Commission, not this Court, to "reconsider its original consideration in the light of the record as freed from the . . . [error] that now beclouds it." *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115; see *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634.

c. Appellees' Brief not only reiterates the Commission's unsupported statements; it makes additional unsupported statements of its own[14] and adds unsupported embellish-

[14] For example, appellees (Br. p. 35) assert, without authority, that "computing the actual length of the companies' respective hauls" (instead of using established percentages (see Appellants' Brief p. 50)) is "the usual trade practice" with respect to division of revenues from interlined shipments. The following, however, were the findings of an examiner of the Commission as the result of an extensive investigation of divisions of revenue on interlined shipments between motor carriers: "Stated as a general rule costs are but one of many elements entering into the establishment of reasonable divisions. *The industry generally uses some or all of the criteria hereinafter enumerated.* The volume and direction of movement of the traffic, financial responsibility of the carrier or carriers for interline settlements and of loss, damage and overcharge claims, effect of competition, the amount of service, relative lengths of haul, whether the joint route is reasonable direct or circuitous, terrain and density of vehicular traffic over the routes, the size and type of movement, who controls the traffic, and simplicity of application. . . . [A certain carrier] has divisions with three [other carriers] . . . based on a percentage of the total through revenues. . . . *This method of determining a basis for divisions is frequently used and*

ments to the evidence."

B. THAT THE DISTRICT COURT PURPORTED TO AFFIRM THE COMMISSION DOES NOT JUSTIFY THE DISTRICT COURT'S DECIDING THE CASE UPON FINDINGS OF FACT AND A LEGAL THEORY DIFFERENT FROM THOSE RELIED UPON BY THE COMMISSION.

Although appellees (Br. pp. 41-42, n.38) admit that the District Court's decision assumed facts different from those found by the Commission, they attempt to justfy the District Court's having done so by pointing out that the errors were all in appellees' favor, "supporting the same result". However, that the District Court reached the same result as the Commission clearly does not excuse its reliance upon

acceptable." Divisions—Textiles, South Carolina to the East, No. 33374 (August 31, 1962), sheets 10-11, 21. (Emphasis added.)

[15] For example, the purported summary of evidence in appellees' footnote 11 (Br. p. 12) is exaggerated and distorted. Although appellees refer to "two Nelson Co. employees . . . and . . . others on the intercom", it is quite clear in the record that only a *total* of two employees (a Mr. Seiferth and a Mrs. Edwards) were involved. (R. 529-34; see Appellants' Br. pp. 52-53) And, although appellees refer to "a Nelson Co. teletype message", the teletype machine was one of the facilities used by both Nelson Co. and Gilbertville Co. (R. 20, 413-44, 498, 626); and there is not a single shred of evidence as to whose teletype message the particular one in question was. The evidence with respect to the two other incidents mentioned in appellees' footnote 11 shows (*1*) that, after Kenneth had torn off and destroyed some used teletype tape which had grown "two or three yards" long and was spilling out of the machine onto the floor, Mr. Shea demanded the tape over and over again, but Kenneth could not un-destroy it (R. 531-32); and (*2*) that Clifford Nelson (who had been away when the investigators arrived), in Mr. Shea's words, "could not explain" when Mr. Shea asked him to explain why Kenneth "was directing the operations of the L. Nelson & Sons Company's business"—a question as unanswerable as the legendary "Have you stopped beating your wife yet?" (R. 537-38)

different facts. As this Court held in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, 88, "[f]or purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency."

Appellees also rely upon *Communist Party* v. *Subversive Activities Control Board*, 367 U.S. 1, where this Court held that a reviewing court was not required to reverse an administrative agency because one of the agency's subsidiary findings was infected with error unless "there were a solid reason to believe that without that subsidiary finding the agency would not have arrived at the conclusion at which it did arrive." (*Id.* at 67) But, although appellees characterize the District Court's erroneous findings of fact as "on immaterial matters", they plainly were not immaterial and—as is even more important—the District Court plainly did not regard them as "immaterial": Whereas in the *Communist Party* case the Board, in the summaries of its modified reports, did not even refer to the finding in question, the District Court featured its erroneous findings in its "syllabus". Moreover, the District Court's different and erroneous findings appeared to show connections between Kenneth and Gilbertville Co. on the one hand and Nelson Co. on the other (see Appellants' Br. pp. 24-26) which, if they had actually existed, would have been most significant. And the District Court's erroneous assumption as to the burden of proof—its implicit holding that appellants were guilty of a violation of law because they were "not shown" to be innocent—plainly was the keystone of the District Court's whole Opinion and its conclusions.

Appellees apparently concede that a reviewing court may not "affirm" the Commission on a legal theory differ-

ent from that used by the Commission, but they offer two mutually inconsistent arguments to justify the District Court's action: first, that the prohibition of sections 5(5) and 5(6) and the prohibition of section 5(4) are the same; and, second, that the Commission's holding (violation of the prohibition of sections 5(5) and 5(6)) was an alternative holding of the District Court and the District Court's holding (violation of the prohibition of section 5(4)) was an alternative holding of the Commission.

Appellees' first argument is unsound because it is built upon their disingenuous assertion that "there is only one statutory prohibition—that set forth in Section 5(4)" (Appellees' Br. pp. 33, 40). In making that assertion appellees rely upon the fact that, as a drafting technique, Congress expressed the prohibition of sections 5(5) and 5(6) in terms of a conclusive presumption of violation of section 5(4)[16] and ignore the statements in the congressional reports and by the draftsmen of the respective provisions that the prohibition of sections 5(5) and 5(6) is necessary in addition to the prohibition of section 5(4) (see Appellants' Br. pp. 27-29). Obviously Congress did not believe sections 5(5) and 5(6) were redundant, and they are not. For example, the prohibition of sections 5(5) and 5(6)—which (insofar as here relevant) forbids only a certain kind of "transaction" by a person having a certain kind of "relationship" to a carrier—raises unique questions of basic and ultimate

[16] Presumably appellees would similarly argue that (*1*) a federal employee's failing to account for public money which he receives, (*2*) a private person's knowingly receiving from a clerk of a federal court money belonging in the registry of the court and (*3*) a dispersing officer's requiring a federal employee to give a receipt for an amount greater than the employee actually receives are all the same because all three crimes are by statute defined as embezzlement. See 18 U.S.C. §§ 643, 647, 652.

fact which appellees have also ignored.[17] The grounds upon which the District Court reached its ultimate conclusion of "control or management in a common interest" (and which appellees urge in this Court) are no more the same as "the conclusive presumption of section 5(5)" upon which the Commission relied (R. 21) than were the other grounds for concluding that the reorganization was "fair and equitable" urged upon this Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80, the same as the judge-made rules of equity upon which the SEC had erroneously relied (see 318 U.S. at 93-94).

Appellees' "alternative holding" argument is inconsistent with the very language of the respective opinions. The Commission's sole ground of decision—the ultimate finding "that Kenneth Nelson was affiliated with Nelson within the meaning [or "definition"] of section 5(6) at the time he purchased the stock of Gilbertville" and "the conclusive presumption of section 5(5)" (R. 21) was expressly rejected by the District Court when it stated that its "reasoning does not . . . require resort to any legislatively enacted definitions or presumptions." (R. 123)[18] Appellees' contention that the Commission adopted or incorporated by reference the basic findings and ground of decision

[17] Although section 5(5) forbids a "transaction" only if the requisite "relationship" exists at the time of the "transaction", and although the Commission's ultimate finding was that "Kenneth Nelson was affiliated with Nelson . . . *at the time he purchased the stock of Gilbertville*" (R. 21) (Emphasis added.), appellees (Br. p. 36) claim that "affiliation" is proved by Kenneth's management of Gilbertville Co. (necessarily after the crucial time) and other "[e]vents subsequent to the purchase".

[18] By no stretch of the imagination can an alternative holding be found in the appended comment (without any finding of "affiliation" or "relationship" or any reasoning or discussion) that "it is meet to observe that the reasoning . . . is confirmed, and *at no juncture contradicted*, by" quoting the full text of sections 5(5), 5(6) and 1(3)(b). (R. 123-24) (Emphasis added.)

of Division 4 is equally unsound. The Commission's Report was substituted, on reconsideration, for Division 4's Prior Report and is a self-sufficient entity, containing, for example, a new recitation of facts which in part duplicates and in part differs from Division 4's recitation; the Commission's Report only purported to "affirm" the ultimate findings of Division 4 and the Examiner which the Commission paraphrased.[19] In fact, the one portion of Division 4's decision which the Commission did "adopt" (concerning the application proceeding) was incorporated by quotation at length.

II. Appellees' attempt to justify the Commission's denial of the application for merger approval is addressed to policies not considered by the Commission in the present case.

The record contained substantial evidence (see, e.g., R. 319-26, 393-94) that the merger of Gilbertville Co. and Nelson Co. would be in the public interest, and the Examiner found that it would be: Comparing the situation existing at the time of the hearing with the situation that would exist as a result of the proposed merger, he found that resulting economies would produce substantial savings, that transportation services would be improved by elimina-

[19] The Commission affirmed the prior decisions only as to their conclusions stated in statutory language: "we affirm the findings . . . *that* the control and management of Nelson and Gilbertville in a common interest has been effected and is continuing in violation of section 5(4)" (R. 21). (Emphasis added.) Moreover, read in context, the Commission's recitation of affirmance is simply the third step of the Commission's own conclusion—that it found Kenneth "affiliated" as defined in section 5(6), wherefore "the conclusive presumption of section 5(5) applies", wherefore the Commission found what section 5(5) conclusively presumes, a violation of section 5(4).

tion of gateway observance problems and by establishment of a new terminal at Springfield and that claim services and safety would be enhanced (R. 76); and he further found that the merger would not be harmful to competition (R. 74-76) and would not adversely affect employees (R. 78) and; on the basis of his personal observation of the individual applicants in the hearing before him, he found that the applicants were not unfit. (R. 72-73) Yet it is obvious on the face of the Commission's Report that, in denying the section 5(2) merger application, the Commission considered nothing but the fact that a "law violation" had been found. (R. 23)

Appellants have shown (Br. pp. 29-37) that the Commission erred by thus automatically denying the merger application. But, according to appellees (Br. p. 43), appellants are "tilting at the windmill of an alleged Commission policy which was never adopted and does not exist." Perhaps appellees' metaphor is not entirely inappropriate, for it seems that appellants might well have been somewhat quixotic in believing that there was any established policy underlying the Commission's denial of the section 5(2) application in the present case, and certainly appellees' argument on this issue goes around and around very much like a windmill.

Appellees admit that the Commission's denial of the section 5(2) application in the present case was based upon a new policy, but they insist (*1*) that the new policy was first formulated in *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39 (November 14, 1958) and (*2*) that the policy of *Central of Georgia* involves a weighing of various factors to determine the public interest and represents an innovation only in that a section 5(4) violation is considered relevant to one factor ("the maintenance of respect for

and the observance of the law") which weighs heavily in a determination of the public interest.[20] Much of appellees' Brief (pp. 28-31, 42-50) is devoted to explanation and justification of the policy of *Central of Georgia* (including and in part supported by citations to a number of Commission decisions) based on what "can" or "may" happen in specific cases.

But appellees' elaborate explanation and justification of the policy of *Central of Georgia* (as well as that policy itself) is wholly irrelevant in the present case. The "more stringent approach" adopted in the present case by Division 4 in its Prior Report of February 26, 1958 was not, and could not have been, based on the *Central of Georgia* case, for the Prior Report preceded the *Central of Georgia* decision by more than eight months. Moreover, when the Commission, in deciding the present case, adopted the policy heralded by Division 4 (by quoting at length Division 4's statement thereof), the Commission indicated by explicit language that it was consciously departing from the policy of *Central of Georgia*.[21]

Unquestionably the "approach" adopted in the present case was automatic denial of a section 5(2) application

[20] Yet this "new" policy explained by Appellees' Brief is virtually identical to the well-established "fitness" doctrine (see Appellants' Brief pp. 30-31); indeed, it appears to be the old "fitness" doctrine clothed in a new, fancier vocabulary. In any event, be it new or old, the policy which appellees describe in their Brief certainly is not the approach "more stringent" than "the views heretofore followed" (R. 23) which the Commision adopted in the present case.

[21] The Commission, in its Report in the present case, first specifically stated that it had "affirmed," in the *Central of Georgia* case, "the views *heretofore* followed", and then declared (by incorporating part of Division 4's Prior Report), "*Now*, after more than 20 years of regulatory experience, *a more stringent approach* is warranted ——" (R. 23) (Emphasis added.)

solely because a "law violation" had been found. Appellants' application was so denied, and logically only a policy of automatic denial could be "a more stringent approach" than a policy of approving a section 5(2) application, "notwithstanding a showing of law violation, because the paramount public interest warranted approval." (R. 23) That "approach" or policy of automatic denial did exist at least in the present case even if it was never invoked again.[22] And it is only the Commission's denial of appellants' section 5(2) application, and the "approach" or policy upon which that denial was based, which is an issue in the present case. Neither the validity of the policy appellees expound in their Brief nor the validity of earlier or later policies is at issue.

Appellees claim that the Commission's refusal to distinguish between a willful and an innocent "law violation" was justified by "the uniform rule that prior participation in Section 5 proceedings establishes awareness of the law" (Appellees' Br. p. 54) and because "there is no room for a claim of innocence when the applicant has previously participated in Section 5 proceedings." (Appellees' Br. p. 47) However, no such rule could be applied to Kenneth, who was not found to have participated in any section 5 proceeding prior to the present case; and the only section 5 proceeding to which the Commission referred (*Charles G. Chilberg et al. — Control — R. A. Burnes, Inc.*) was not commenced until long after March of 1953, when the alleged

[22] Indeed, inasmuch as only four of the eleven Commissioners concurred in that "approach", it is very possible that it was never used again. Four Commissioners dissented (one from Division 4's decision and three from the Commission's), one concurred, and two never participated.

violation of law in the present case occurred.[23] Moreover, since even someone familiar with section 5(2) cannot be expected to predict sophisticated applications of sections 5(5) and 5(6) (see Appellants' Br. p. 33 n. 20), and since the Examiner found as a fact that in the present case appellants were not willful, appellees' asserted irrebuttable presumption (that no violation by a person who has participated in section 5 proceedings can be innocent) is plainly arbitrary and irrational. See, e.g. *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 652-53; *Colorado-Wyoming Gas Co.* v. *Federal Power Commission*, 324 U.S. 626, 634; *cf. Slochower* v. *Board of Higher Education*, 350 U.S. 551; *Wieman* v. *Updegraff*, 344 U.S. 183; *Tot* v. *United States*, 319 U.S. 463.

Appellees attempt to explain the Commission's failure to consider the factors which indicated that the proposed merger was in the public interest (and which were the bases of the Examiner's conclusion that the merger should be approved) by reference to an alleged rule that the Commission "will give 'no weight whatsoever' to advantages generated by the unlawful operations" (Appellees' Br. pp.

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[23] Appellees dwell at length (e.g., Br. pp. 50-52) on a supposed "plan" of Nelson Co. to create a larger motor carrier. It is certainly true and quite natural, that Nelson Co., a carrier serving the textile industry, sought to follow its customers when the textile plants moved and therefore sought to acquire rights to the south of its territory. (R. 394-95) After the adverse decision, on grounds of dormancy, in *L. Nelson & Sons Transport Co.—Purchase—White's Express*, 59 M.C.C. 675 (December 22, 1953), Nelson Co.'s principal stockholders acquired, with approval of the Commission in 1956, the Byrnes rights. But there is no evidence, and the Commission never even suggested, that Gilbertville Co. was a part of any such plan. Indeed, Kenneth purchased Gilbertville Co. long before the *White's Express* decision, and the decision in the *Byrnes* case came in 1956, long after Gilbertville Co. and Nelson Co. filed their section 5(2) application and only a short time before the Examiner's hearing in the present case.

22, 50-54). However, even if that principle were a sufficient excuse for the Commission to disregard the mandatory considerations of section 5(2)(c), the policy of section 5, and the National Transportation Policy (see Appellants' Br. pp. 29-37), that principle has no application to the present case. The factors the Examiner recognized were all prospective economies and advantages over the then-existing operations which only merger would make possible (R. 76); none of those economies or advantages was in any sense a product of the alleged violation of law.

III. Appellees offer no excuse for the Commission's failure to indicate whether and why it exercised its discretion by ordering the harsh remedy of divestiture.

Appellees (Br. pp. 23, 55-56) attempt to justify the divestiture order by arguing that "[t]he straightforward solution is to separate the acquiring carrier from the acquired" and by referring to antitrust cases involving "'intercorporate combination'". But in the present case the Commission did not find that the corporations had been combined or intertwined but only that they were linked through the alleged "affiliate", Kenneth. Therefore, as appellants have shown (Br. p. 46 n. 32), an injunction of Kenneth's "affiliation" with Nelson Co. and of the alleged common control or management, like that in Division 4's order,[24] should

[24] Appellees (Br. pp. 56, 59) cannot conceivably mean to suggest that Division 4's order directing appellants "to terminate the violation" (R. 94) required Kenneth to divest himself of his Gilbertville Co. stock. Such a construction of the language of Division 4's order would be unreasonable in any circumstances and would be absurd in light of the inclusion of all of the operative paragraphs of Division 4's order in the Commission's order (R. 25-26) in addition to the paragraph directing divestiture. The three cases cited by appellees (Br. p. 56), *Kenosha Auto Transport Corp.—Investigation of*

be quite sufficient and divestiture could not be (in the language of section 5(7)) "necessary" to separate the carriers and "prevent continuance of such violation."[5]

Appellees also suggest (Br. p. 57) that the divestiture order was "necessary" because Kenneth's "connection with Nelson Co., developed on the basis of intangible family ties, could not be effectively severed." However, elsewhere in their Brief (pp. 37-38) appellees insist that the Commission did not find "affiliation" solely because of blood relationship, and that position is confirmed by the Commission's ruling in June of 1954 that

> "the holding of stock by the stockholders of . . . [Nelson Co.] and by their brother of the controlling stock in Gilbertville Trucking Co., Inc., will not result in common control of the operations and will not bring about an improper competitive situation." (R. 686-87)

Moreover, whether or not divestiture is "necessary" and whether or not an injunctive order (or some other alterna-

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Control, 80 M.C.C. 59, 77-79 (Div. 4, 1959); *Black—Investigation of Control*, 75 M.C.C. 275, 282-283 (Div. 4, 1958); *Houff—Control—Elliott Bros. Trucking Co.*, 70 M.C.C. 177, 194 (Div. 4, 1956), *affirmed*, 80 M.C.C. 637 (1959), do not suggest that a Commission order "to terminate" a violation, like Division 4's order in the present case, has ever been considered equivalent to an order to dispose of stock. At most, those cases indicate that a violation can be terminated, in whole or part, through a divestiture order, which is hardly a remarkable proposition.

[5] *Cf. American Crystal Sugar Co.* v. *Cuban-American Sugar Co.*, 152 F. Supp. 387 (S.D.N.Y. 1957), *affirmed*, 259 F.2d 524 (2d Cir. 1958) ("[I]ssuance of the injunction as hereinbefore directed constitutes an appropriate remedy so that divestiture is not necessary."); *United States* v. *General Electric Co.*, 115 F. Supp. 835, 871 (D.N.J. 1953) ("The violations of the antitrust act which General Electric and the other defendants were found to have committed can be eliminated by means of the other provisions of the judgment. . . . As divestiture of General Electric is not necessary to foster competition, the Government's request therefor will be denied.")

tive)[26] would be effective are decisions to be made by the Commission, in whom Congress vested discretion, not by this Court, and to be explained by the Commission in its Report, not by appellees' counsel in their Brief.[27] But the Commission's Report — and, indeed, the whole record (whether a divestiture order should be entered never hav-

[26] A great number and variety of other alternatives might be used. See, e.g., *Central of Georgia Ry. Co. Control*, 307 I.C.C. 39 (1958) (voting trust); *Nigro Freight Lines, Inc.—Purchase—Coady Trucking Co.*, 90 M.C.C. 113 (1962) (order barring operations in interstate commerce by two of three carriers involved); *cf. Salzberg* v. *United States*, 176 F. Supp. 867 (S.D.N.Y. 1959) (purchase approval granted subject to condition). The Commission, in formulating a remedial order, certainly has all of the flexibility and range of choice that would be open to a court of equity. See Appellants' Br pp. 45-46.

[27] The mere fact that the Commission entered the order is not enough. The mandatory provisions of section 8(b) of the Administrative Procedure Act require that "[a]ll decisions . . . include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; *and* (2) the appropriate rule, order, sanction, relief, or denial thereof." (Emphasis added.) Even if divestiture were (as appellees call it) the "usual" remedy, neither that fact nor any authority cited by appellees excuses the Commission from compliance with section 8(b). As this Court said in *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 392, "One cannot generalize as to the proper scope of these orders. It depends upon the facts of each case". There is no substitute for the Commission's consideration of and judgment upon the necessity for divestiture in this case and the Commission's explanation thereof.

ing been argued or considered as an issue in the case[28])—remains devoid not only of any explanation as to why divestiture was ordered, but also of any indication that the Commission did in fact exercise discretion in ordering divestiture.

CONCLUSION

For the reasons stated herein and in their principal Brief, appellants respectfully submit that the judgment of the District Court should be reversed.

Respectfully submitted,

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[28] Appellees' statement (Br. p. 59) that the protestants and the Bureau urged "a divestiture" before Division 4 is incorrect. The exceptions filed on behalf of the protestants and the Bureau (certified copies of which appellants have lodged with the Clerk of this Court) do not refer to divestiture and only contend that the Examiner should have recommended a remedial order, such as Division 4 in fact formulated, that the alleged violation of section 5(4) be terminated. Division 4 (R. 87) obviously used "divestiture" in the loose sense meaning any order of separation (including divorcement and dissolution as well as divestiture). See *United States* v. *E.I. duPont de Nemours & Co.*, 366 U.S. 316, 327 n. 11; Hale & Hale, Market Power: Size and Shape Under the Sherman Act 370 (1958); Oppenheim, *Divestiture as a Remedy Under the Federal Antitrust Laws—Economic Background*, 19 Geo. Wash. L. Rev. 119 (1950).